Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands	)	WT Docket No. 03-66 RM-10586
Part 1 of the Commission's Rules – Further Competitive Bidding Procedures	)	WT Docket No. 03-67
Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions	)	MM Docket No. 97-217
Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Licensing in the Multipoint Distribution Service and in the Instruction Television Fixed Service for the Gulf of Mexico	)	WT Docket No. 02-68 RM-9718

To: The Commission

PETITION FOR RECONSIDERATION
OF THE
INDEPENDENT MMDS LICENSEE COALITION

The Independent MMDS Licensee Coalition ("IMLC") hereby petitions the Commission to reconsider in several respects its *Report and Order and Further Notice of Proposed Rulemaking*,[1] released July 29, 2004, (FCC 04-135) (the "*R & O*") in the limited respects set forth below. IMLC is an *ad hoc* group of independent MDS and MMDS licensees.

[1] *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provisions of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd. 14165 (2004).

It participated actively in the Comment stage of this proceeding. While IMLC is generally pleased with the new structure adopted for the MDS/ITFS industries, the Report and Order left a number of elements of the new structure seriously unclear, and in other respects adopted provisions which are counterproductive to the Commission's stated goals. For example, the commenting parties had been unanimous in urging the Commission to effectuate the transition from the old to the new order on a metropolitan area basis (*i.e.*, BTAs or the equivalent). A "metro market" approach conforms more nearly to existing licensing parameters for both site-based incumbents and geographic licensees. It also would coincide better with actual business relationships and marketing plans in most markets. Finally, it would immeasurably simplify the complications attendant on orchestrating a transition process by reducing the number of parties who must be accommodated. We strongly urge the Commission to reconsider that element of the R &O that adopted an MEA-based transition process. We will not dwell on this issue here, however, since we expect the industry association to address the matter at greater length.

We will also not address at length other small but important issues which we expect to be addressed in detail by the industry. For example, the *Secondary Markets Order*[2] provides that spectrum lessees (whether under "spectrum manager" arrangements or de facto control arrangements) must qualify under the same eligibility criteria as the license holders themselves.[3] This provision would apply to ITFS leases that have not been grandfathered. Thus, any new ITFS lessees (and any lessees assuming that status after the expiration of the current generation of leases) would have to be accredited educational institutions or other

[2] *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 18 FCC Rcd. 20604 (2003).
[3] *Id.* at Paras. 111, 143.

nonprofit educational organizations. It does not appear that the Commission intended to so limit the potential lessees of excess ITFS spectrum. Uncertainty on these and other key issues will only hamper attempts by the industry to definitively establish relationships necessary to move forward with transition to the new order.

A. Rules Should be Modified Before Transitions Begin

The points noted above illustrate how difficult it can be to even begin planning a transition based on some reasonable business model of what a particular market will look like when the ground rules for the service are shifting. Indeed, shifting ground rules have been the tragic flaw of MDS/ITFS for the last two decades. No one could make realistic plans to go forward with a service offering to the public when the possibility of new and radically altered rules (even when the alteration is for the better) is in the offing. IMLC, like most of the industry, had fervently hoped that the *R & O* would resolve all major licensing and operational issues and permit the industry to move forward into the service stage. Instead, because the MEA-based transition scheme noted above is widely viewed as unwieldy, transitions cannot realistically go forward. In addition, the availability of the auction process for non-transitioned markets may be attractive for both prospective transition Proponents and non-Proponent incumbent licensees. Depending on how the auction rules come out, it might make sense for prospective operators to use that as a spectrum-clearing or transition-accomplishing mechanism rather than undertaking the complex process of initiating a transition. But while the *Further NPRM* is pending, the usefulness of that tool for everyone involved is uncertain.

One particularly critical uncertainty of the transition process is the possibility that existing licensees could effectively opt out of the transition process and instead participate in

an auction.[4] See *R & O* at Para. 278. This band-clearing mechanism could prove very useful in avoiding or resolving transition issues, but the mechanism will not be established until the *Further Rulemaking* is completed. This leaves licensees and Proponents in limbo as to whether that is an available course of action. Until the applicability of auctions to incumbents is resolved, transitions cannot go forward. Accordingly, the Commission should delay the effective date of the transition rules until the *Further Rulemaking* is completed. We believe that any transition plan will be subject to reasonable objection by potential participants that the final rules governing the transition are not yet known, and they therefore cannot rationally sign on to a particular plan. IMLC asks this relief reluctantly since the transition to the new order has already been delayed by the extraordinary six month period between adoption of the new rules and their effective date. We therefore urge the Commission to expedite action on the *Further Rulemaking* to the greatest extent possible. This industry has already suffered enough from delay, but neither can it move forward until the ground rules are solidly established. Of course, in those rare cases where all parties in an MEA are able to work out a transition plan, they should be permitted to go forward. Only involuntary transitions need be delayed.

While reconsideration is pending, the Commission should also grant STAs liberally to permit limited market transitions to get under way in the near term. For example, licensees in individual markets will be able to work out arrangements whereby their channels are transitioned to the new band plan, albeit in a much more limited area than an MEA. Such arrangements would obviously have to be on a non-interfering or consensual basis to non-participating entities, but STAs would permit service to go forward in many core metro areas.

[4] The transition rules as adopted do not offer incumbents this option, but the *Further NPRM* expressly contemplates it.

These operations would also have to be subject to the rules finally adopted, but in many markets the likelihood of interference to non-participating entities outside the core BTA is relatively minimal.

B. Status of Guard Bands Should be Clarified

The rules as adopted appear to assign each four channel BRS or EBS licensee a one megahertz channel in the guard band. (*R & O* at Paras. 37 and 43). The rules do not make clear what operational or other restrictions apply to these bands. The usefulness of these guard bands could be improved by two simple expedients. First, the Commission should, where possible, assign the guard band spectrum to the adjacent mid-band (MBS) licensee or LBS. Under the current set-up, these small one MHz channels are useless for most purposes. However, if associated with a licensee's contiguous spectrum, they could potentially be put to good use. Thus, the first three K-band channels should be assigned to the E4 licensee (assuming it is a four-channel holder). This would give that licensee a total of 7 contiguous megahertz of spectrum without any negative impact on anyone else. Similarly, the last three J-band channels would be assigned to the A4 licensee with similar results, and the first three J-band channels could go to the D3 licensee. These simple measures will boost the utility of the guard band channels if, as we believe may often be the case, they are not needed for "guarding" purposes.

Second, the rules do not seem to envision any operations over the guard channels, even though in many cases the spectrum use may be arranged by agreement among the parties, by engineering techniques, or by the expedient above, so that the channels can actually be incorporated into operations. The rules should therefore make clear that the guard band spectrum may be used under the same power limits and interference criteria as apply to the

adjacent channels with which they are associated. Non-adjacent guard band channels could also be so operated, but on a secondary basis.

In addition, guard band operations, like main channel operations, should not have to protect dark or vacant channels until those channels are activated. We anticipate that interference issues will most often be resolved by agreement between adjacent operators. Problems arise when an operator must provide theoretical protection to a vacant channel where there is no one to issue a consent or where there is a dark channel and the licensee has no reciprocal interest in being cooperative. Unless Operations can proceed on an interim basis, the operating licensee is hogtied.

C. Conclusion

For the reasons stated, the Commission should modify its rules in the respects set forth above.

Respectfully submitted,

Independent MMDS Licensee Coalition

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